Supreme Court, U.S.
FILED
OCT 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-456

In the Supreme Court of the United States

OCTOBER TERM, 1988

KENNETH G. MANCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, it was harmless beyond a reasonable doubt for the presiding judge to fail specifically to instruct the court-martial panel in a prosecution for the wrongful use of marijuana that petitioner must have known that the substance he ingested was marijuana.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-32a) is reported at 26 M.J. 244. The opinion of the Air Force Court of Military Review (Pet. App. 33a-34a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on July 18, 1988. The petition for writ of certiorari was filed on September 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Following a special court-martial at Bergstrom Air Force Base in Texas, petitioner, a member of the United States Air Force, was convicted of the wrongful use of

marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. IV) 912a. He was sentenced to a bad conduct discharge and a reduction in grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 33a-34a). The Court of Military Appeals affirmed (*id.* at 1a-32a).

1. On December 2, 1985, petitioner consensually provided a urine sample at the Bergstrom Air Force Base hospital (Tr. 168, 174; PXs 2, 8). The urine sample was shipped by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base, Texas (Tr. 179; PX 3). Subsequent screening and confirmatory tests at the Brooks laboratory and at CompuChem Labs, a civilian toxicology laboratory, disclosed the presence of the metabolite of marijuana in petitioner's urine (Tr. 192, 224; PXs 3, 6).

Thereafter, petitioner was charged with the wrongful use of marijuana. At trial, in his instructions on the elements of that offense, the trial judge charged the members of the court-martial panel as follows (Tr. 320; Pet. App. 7a):

> The elements of that offense are, at the time and place alleged, and the time and place alleged here is, between on or about 1 November 1985 and 2 December 1985, within the continental United States, that the accused used marijuana. The definition of use of marijuana is, that use of marijuana is the act of administration, ingestion, or physical assimilation of the drug into one's body or system. Particular forms of this act are smoking, snuffing, eating, drinking, or injecting. The second element is, that the use by the

accused was wrongful. To be punishable under Article 112a, and Article 112a is the article under which the accused is charged, use of a controlled substance must be wrongful. Use of a controlled substance is wrongful if it is without legal justification or authorization. Use of a controlled substance is not wrongful if it was done without the knowledge of the contraband nature of the substance. Use of a controlled substance may be inferred to be wrongful. However, the drawing of this inference is not required.

2. The Air Force Court of Military Review summarily affirmed the conviction. Pet. App. 33a-34a. The Court of Military Appeals also affirmed. *Id.* at 1a-32a. It held that a complete charge on the wrongful possession or use of a controlled substance should include a specific instruction requiring the court-martial panel to find that the defendant had knowledge of the presence of the substance that he ingested. *Id.* at 20a. Although the instructions in this case did not specifically require the panel to make such a finding, the court, relying on this Court's decision in *Rose* v. *Clark*, 478 U.S. 570 (1986), found that the error was harmless beyond a reasonable doubt, because that finding was implicit in other findings made by the panel. Pet. App. 21a-25a.

ARGUMENT

Petitioner contends the Court of Military Appeals misapplied this Court's decision in *Rose* v. *Clark, supra*, in ruling that an error in the jury instructions in his case was harmless. That fact-bound claim does not warrant review by this Court.

The Court of Military Appeals observed that the trial judge instructed the panel on all the elements of the offense

of the wrongful use of marijuana. Pet. App. 23a-24a. Although the trial judge did not expressly charge the panel that it was required to find that petitioner knew that he had ingested a controlled substance, the judge did instruct that panel that it had to find that petitioner had "knowledge of the contraband nature of the substance." *Id.* at 7a. In light of that instruction and the evidence in the case that petitioner had ingested marijuana, as the Court of Appeals explained, the court-martial panel members could not have found that petitioner knew that the substance he used was contraband without also finding that petitioner knew that he had ingested marijuana. *Id.* at 23a-24a. Thus, while an additional instruction on that issue would have been helpful, and the Court of Military Appeals directed that such an instruction should be given in the future, the omission in this case does not require a reversal, because the court members had to find beyond a reasonable doubt that petitioner knowingly used marijuana.* Moreover, petitioner did not claim at trial that he had innocently ingested marijuana. See *Id.* at 24a; Tr. 313-317. Under these circumstances, the Court of Military Appeals correctly found that any failure by the trial judge to be more precise in his instructions was harmless.

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* The Court of Military Appeals has not been hesitant to reverse the conviction in those urinalysis cases in which the instructions have omitted a necessary element of the offense. In *United States* v. *Brown*, 26 M.J. 266 (C.M.A. 1988), a case decided less than two weeks after the decision in this case, the Court of Military Appeals reversed the defendant's conviction based upon an instruction error. In *Brown*, the trial judge failed to instruct the panel that knowledge of the presence of the substance and knowledge of the contraband nature of the substance must be proved. Because the instructions entirely omitted an element of the charged offense, the Court held that the error was not harmless. 26 M.J. at 267.

Petitioner simply disagrees with the lower court's resolution of that fact-bound question. He does not allege any conflict among the circuits on this point of law, and the decision of the Court of Military Appeals provided substantial guidance for trial judges in future cases. Accordingly, petitioner's complaint is not one that is likely to recur with any frequency. For these reasons, this case does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60711